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WHEN AN EX CAN TAKE IT ALL: THE EFFECT—AND NON-EFFECT—OF REVOCATION ON A WILL POST-DIVORCE

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The culture of marriage is changing.[1] Almost fifty percent of present-day marriages will end in divorce.[2] Simultaneously, there has been an increase in the number of individuals choosing to defer marriage.[3] Often, the decision to postpone marriage is triggered by a desire to be more financially stable before tying the knot.[4] Although disheartening, the current statutory

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1. After decades of declining marriage rates, steady rates of divorce, distinct changes in the "traditional" family structure, and volatile economic times, the American culture surrounding marriage has evolved into something that many members of "The Greatest Generation" would hardly recognize. WENDY WANG & KIM PARKER, PEW RESEARCH CENTER, RECORD SHARE OF AMERICANS HAVE NEVER MARRIED: AS VALUES, ECONOMICS AND GENDER PATTERNS CHANGE 4 (2014), *available at* http://www.pewsocialtrends.org/files/2014/09/2014-09-24_Never-Married-Americans.pdf. *See generally* TOM BROKAW, THE GREATEST GENERATION (1998), particularly the section on "Love, Marriage, and Commitment." *See also* Nuala Calvi, *What 'War Brides' of the Greatest Generation Knew About Marriage*, FOX NEWS (Sept. 15, 2014), http://www.foxnews.com/opinion/2014/09/15/what-war-brides-greatest-generation-knew-about-marriage/; Brett McKay & Kate McKay, *7 Lessons in Manliness from the Greatest Generation*, THE ART OF MANLINESS (Apr. 30, 2009), http://www.artofmanliness.com/2009/04/30/7-lessons-in-manliness-from-the-greatest-generation/.

2. Jasmin Palacios, *Divorce in America [infographic]*, DAILYINFOGRAPHIC (Oct. 24, 2013), http://dailyinfographic.com/divorce-in-america-infographic.

3. WANG & PARKER, *supra* note 1, at 4–5, 23. For women, the median age for a first marriage is twenty-seven; the median age for a first marriage for men is twenty-nine. *Id.* This is a drastic change from 1960, where the median age for a first marriage was twenty for women, and twenty-three for men. *Id.*

4. *See generally id.* According to the 2012 Pew Research Center study, twenty-seven percent of never-married individuals say they are not financially prepared for marriage, with thirty percent saying that they have not found someone who has the qualities that they are looking for in a spouse. *Id.* at 7, 30. Furthermore, never-married young adults aged twenty-five to thirty-four are more likely to cite financial security as the main reason for not being currently married (thirty-four percent of those ages twenty-five to thirty-four, compared with twenty percent of those thirty-five and older). *Id.* at 14, 30. Among never-married women, seventy-eight percent say that finding a person with a steady job is very important to them in choosing a spouse or partner. For never-married men, forty-six percent share this view. *Id.* at 28. Finding someone who shares similar ideas about raising children weighs more heavily for men, with seventy percent of men citing this

scheme regarding wills post-divorce, coupled with an individual's increased likelihood of divorce, often results with the fruitful savings of these financially savvy individuals being left in the most unintended of hands.

This prudent estate planning nearly always includes a will—a legal tool utilized as the last remaining "voice of the testator."[5] When probating a will, a court's primary responsibility is to properly construe and apply testator intent.[6] Because the testator is no longer present to speak about his or her wishes and elaborate on this intent, the law requires that the probate court adhere stringently to the explicit language stated in the will.[7] Given the frequency with which individuals fail to update their wills, however, such a strict adherence to the text can prove disastrous when a testator fails to change his or her estate plan.[8] This situation can leave a testator's current loved ones with nothing and an ex-spouse—whom the testator presumably no longer wants to receive a bequest or be named executor under the will—with a windfall.

When finalizing a divorce, a couple's first priorities usually include the emotional and time-consuming issues of asset division, child custody, child support, and alimony.[9] Changing their individual estate plans to reflect their new marital status is typically not at the forefront of their concerns.[10] To make matters more difficult, the inheritance consequences of an outdated will do not become apparent until after the death of one of the former spouses.[11] This leaves the decedent's family and current spouse, if there is one, with many unanswered questions, including whether the decedent intended for his or her former spouse to take the bequest included in the original will.[12]

The Uniform Probate Code's ("UPC") revocation upon divorce statute[13] is a statutory response to this common failure to execute a new will after divorce. The statute provides an express rule to clarify these unan-

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as an important factor. *Id.* at 21. *See also* Erin Hayes, *More Americans Waiting Longer to Marry*, ABC NEWS (June 29, 2014), http://abcnews.go.com/WNT/story?id=130884 (quoting the explanation of why a thirty-one-year-old soon-to-be bride waited to marry: "I wanted to be financially secure . . . I would never want to depend on anybody.").

5. *Reasons to Challenge a Will*, FINDLAW, http://estate.findlaw.com/wills/reasons-to-challenge-a-will.html (last visited Mar. 3, 2015).

6. *Id.*

7. *Id.*

8. Hailey H. David, Note, *The Revocation-Upon-Divorce Doctrine: Tennessee's Need to Adopt The Broader Uniform Probate Code Approach*, 39 U. MEM. L. REV. 383, 384, 399 (2009) (noting the situation "frequently" arises "in which a testator's former spouse takes assets against the testator's wishes because the testator simply failed or did not have enough time to execute a new will after the divorce").

9. *Id.* at 384.

10. *Id.*

11. *Id.*

12. *Id.*

13. *See infra* note 14.

swered questions and to resolve the problem of the unintended former spouse beneficiary. This Comment will illustrate the complications that result when a state fails to fully adopt the clear bright-line standard set forth in the UPC's revocation upon divorce statute, Section 2-804.[14] A recent Maryland Court of Appeals case, *Nichols v. Suiter*,[15] provides an instructive example of the complications that can quickly arise without such a statute. State legislatures that have not already done so should universally adopt the statutory provisions set forth in the UPC's revocation upon divorce statute, Section 2-804. This would promote the efficient resolution of probate administration, protect the common testator who fails to change his will upon divorce, and better effectuate the new intentions of the divorced testator.

I. BACKGROUND

The National Conference of Commissioners on Uniform State Laws' (now known as the Uniform Law Commission) decision to promulgate the UPC's revocation upon divorce statute resolved a systematic inconsistency in American estate jurisprudence.[16] The inconsistent state court decisions regarding revocation upon divorce contrasted sharply with the Uniform Law Commission's executive goal of uniformity.[17] This Comment will delve into this inconsistency, with the hope that such an analysis will exemplify why state courts should adopt the UPC's recommended revocation upon divorce statute. Part I.A will discuss the general purpose and development of the UPC.[18] Part I.B will then focus specifically on the rationale

14. UNIF. PROBATE CODE § 2-804(b)(1) (2001). This section states, in pertinent part:

> (b) [Revocation Upon Divorce.] Except as provided by the express terms of a governing instrument, a court order, or a contract relating to the division of the marital estate made between the divorced individuals before or after the marriage, divorce, or annulment, the divorce or annulment of a marriage: (1) revokes any revocable (A) disposition or appointment of property made by a divorced individual to his [or her] former spouse in a governing instrument and any disposition or appointment created by law or in a governing instrument to a relative of the divorced individual's former spouse, (B provision in a governing instrument conferring a general or nongeneral power of appointment on the divorced individual's former spouse or on a relative of the divorced individual's former spouse, and (C) nomination in a governing instrument, nominating a divorced individual's former spouse or a relative of the divorced individual's former spouse to serve in any fiduciary or representative capacity, including a personal representative, executor, trustee, conservator, agent, or guardian; and (2) severs the interests of the former spouses in property held by them at the time of the divorce or annulment as joint tenants with the right of survivorship [or as community property with the right of survivorship], transforming the interests of the former spouses into equal tenancies in common.

Id.

15. 435 Md. 324, 78 A.3d 344 (2013).

16. *See infra* Part I.A.

17. *See infra* Part I.C.

18. *See infra* Part I.A.

and objective principles underlying Section 2-804.[19] The Comment then conducts a jurisdictional case study, with each subsequent section addressing a different type of statutory scheme. Part I.C.1 will discuss jurisdictions whose revocation upon divorce statutes mirror that of the UPC.[20] Part I.C.2 will examine jurisdictions that have failed to adopt a specific revocation upon divorce statute and instead rely on general revocation statutes and a couple's property settlement agreements when probating the testator's will.[21] Part I.C.3 will evaluate jurisdictions that refuse to revoke any will without an explicit revocation statute.[22] Part I.C.4 will discuss the rare occurrence in which a jurisdiction will totally and explicitly abolish revocation upon any change in marital status.[23] Part I.D will conclude the Background Section with an edifying case study analysis of the Maryland Court of Appeals case, *Nichols v. Suiter*.[24]

A. The Uniform Probate Code: History, Developments, and Purpose

Early American probate law developed in a haphazard and piecemeal fashion.[25] Influenced by the English law that the colonial settlors brought with them, states generally followed the standards set forth by the English Statute of Frauds, the 1837 Wills Act, or some combination of the two.[26] Because the law in England remained largely inconsistent among different localities, individual colonists would often bring a distinct local variation of the law to America.[27] Thus, probate law varied widely from colony to colony and later, from state to state.[28]

The National Conference of Commissioners on Uniform State Laws ("NCCUSL") was established in 1892 to address these inconsistencies.[29] Its goal was "to promote uniformity in the law among the several States on subjects as to which uniformity is desired and practicable."[30] In 1940, Pro-

19. *See infra* Part I.B.

20. *See infra* Part I.C.1.

21. *See infra* Part I.C.2.

22. *See infra* Part I.C.3.

23. *See infra* Part I.C.4

24. *See infra* Part I.D.

25. Robert Whitman, *Revocation and Revival: An Analysis of the 1990 Revision of the Uniform Probate Code and Suggestions for the Future*, 55 ALB. L. REV. 1035, 1041 (1992).

26. *Id.* at 1039. The author notes that the development of wills in the American colonies was influenced by "living English law," those "norms and practices which developed indigenously, to cope with new, special problems of life in the settlements," as well as "those norms and practices that the colonists adopted because of [their ideological beliefs]." *Id.* at 1039–40 (quoting LAWRENCE FREIDMAN, A HISTORY OF AMERICAN LAW 35 (2d ed. 1985).

27. *Id.* at 1039, n.32.

28. *Id.*

29. *Id.* at 1041.

30. Nat'l Conference of Comm'rs on Unif. State Laws Const. art. 1.2, *available at* http://www.uniformlaws.org/Narrative.aspx?title=Constitution. The National Conference of

fessor Thomas E. Atkinson suggested to the American Bar Association ("ABA") Section of Real Property, Probate, and Trust Law that the organization prepare a Model Probate Code; the Section did so in 1946.[31] Although it provided a basis for statutory revision in several states, fewer than half of the states ever fully adopted the Model Probate Code.[32] In 1962, the NCCUSL, along with the ABA Section on Real Property, Probate, and Trusts undertook the Uniform Probate Code project.[33] After six years, the NCCUSL and the ABA House of Delegates approved the UPC in 1969.[34] The primary purposes of the UPC are:

> (1) to simplify and clarify the law concerning the affairs of decedents . . . ; (2) to discover and make effective the intent of a decedent in distribution of his property; (3) to promote a speedy and efficient system for liquidating the estate of the decedent and making distribution to his successors; (4) to facilitate use and enforcement of certain trusts; [and] (5) to make uniform the law among the various jurisdictions.[35]

In its simplest form, the UPC is designed to provide the state legislatures with a set of standards that evince "predictability, provability, and correctness."[36]

The UPC has been amended a number of times since 1969, with the most substantial revisions to the Code's revocation sections occurring in 1990.[37] In 1990, the UPC drafters felt it necessary to "fine-tun[e]" the rev-

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Commissioners on Uniform State Laws is also known as the Uniform Law Commission ("ULC"); *see also Frequently Asked Questions*, UNIFORM LAW COMMISSION: THE NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS, http://www.uniformlaws.org/Narrative.aspx?title=Frequently%20Asked%20Questions (last visited Jan. 5, 2014) (noting that the nonpartisan volunteer organization is the source of over 300 acts that "secure uniformity of state law when differing laws would undermine the interests of citizens throughout the United States"); EDSON R. SUNDERLAND, HISTORY OF THE AMERICAN BAR ASSOCIATION AND ITS WORK 6 (1953) (noting that the American Bar Association, which was established in 1878, also states that one of its principle purposes is the promotion of "uniformity of legislation").

31. Stephanie J. Wilbanks, *Parting Is Such Sweet Sorrow, But Does It Have to be So Complicated? Transmission of Property at Death in Vermont*, 29 VT. L. REV. 895, 900 (2005).

32. *Id.*

33. Whitman, *supra* note 25, at 1042.

34. Wilbanks, *supra* note 31.

35. UNIF. PROBATE CODE § 1-102(b) (2001).

36. Wilbanks, *supra* note 31, at 901 (generalizing from the UNIF. PROBATE CODE art. II, pt. 2, general cmt., 8 U.L.A. 144). "[The UPC] provides a comprehensive and integrated set of rules governing the transmission of wealth by will, by non-probate transfers, and by intestacy. It includes not only carefully crafted statutory provisions, but also detailed commentary explaining those provisions." *Id.* at 903.

37. *Id.* at 900–01. The Uniform Probate Code has been substantially revised in 1975, 1982, 1987, 1989, 1990, 1991, 1997, 1998, 2002, 2003, 2008, and 2010. *Legislative Fact Sheet—Probate Code*, UNIFORM LAW COMMISSION: THE NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS,

ocation upon divorce section in order "to give greater effect to the testator's actual intent, to deal with the problems that ha[d] surfaced in post-1969 case law, and to apply the rules governing probate transfers to non-probate transfers."[38] These changes reflected a modern desire to reduce strict adherence to the formalistic probate systems originally used in England, as well as simultaneously provide the courts with a more efficient standard to determine testator intent.[39]

B. Uniform Probate Code Section 2-804, the Revocation by Divorce Statute: Background and Purpose

Beginning with the Model Probate Code in 1946, the NCCUSL has consistently addressed revocation in their recommended proscriptions, evincing the importance that drafters have placed on this concept.[40] The current version of the UPC revocation upon divorce statute, Section 2-804(b)(1)(i), states:

> Except as provided by the express terms of a governing instrument, a court order, or a contract relating to the division of the marital estate made between the divorced individuals before or after the marriage, divorce, or annulment, the divorce or annulment of a marriage: (1) revokes any revocable (i) disposition or appointment of property made by a divorced individual to his [or her] former spouse in a governing instrument and any disposition or appointment created by law or in a governing instrument to a relative of the divorced individual's former spouse.[41]

The current 1990 revision broadened the scope of the statute to include revocation of certain will substitutes and trusts, such as revocable inter-vivos trusts, life insurance, retirement benefits, and annuities.[42] It also extended revocation to any provisions in the testator's will favoring the relatives of the former spouse.[43] This expansion of the statute demonstrates the UPC drafters' intent to create a more inclusive revocation statute that co-

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http://www.uniformlaws.org/LegislativeFactSheet.aspx?title=Probate%20Code (last visited Jan. 14, 2015).

38. Whitman, *supra* note 25, at 1042–43. The revocation statute is now UNIF. PROBATE CODE § 2-804 (2001).

39. Whitman, *supra* note 25, at 1061. *See also* Wilbanks, *supra* note 31, at 901–02, 935 (noting that the revocation sections demonstrate a response to the decline of formalism in favor of determining testator intent and that the 1990 revisions indicate that the UPC drafters were less concerned with formalism and protecting the testator, but rather, once again, their primary focus was on properly effectuating testator's intent).

40. Whitman, *supra* note 25, at 1041–42. *See, e.g.*, UNIF. PROBATE CODE §§ 2-507-09 (1975); UNIF. PROBATE CODE §§ 2-507-09 (1982); UNIF. PROBATE CODE §§ 2-507-09 (1987); UNIF. PROBATE CODE §§ 2-507-09 (1990).

41. UNIF. PROBATE CODE § 2-804(b)(1)(i) (2001).

42. *Id.* § 2-804, comments.

43. *Id.*

vers more situations and more people. The drafters' decision to use such specific language for its lone exception ("except as provided by the *express* terms") provides evidence that the drafters intended this to be a bright-line rule that could only be trumped by an absolute and unequivocal statement to the contrary.[44]

C. Jurisdictional Case Study: Analyzing Different Statutory Schemes

Although the UPC drafters developed the current revocation upon divorce statute to serve as a recommended exemplar for state legislatures, many states have not yet heeded the guided advice. This Section will discuss the various revocation schemas currently operational in state legislatures throughout the United States, and the implications that each respective schema can have on an individual's will.

1. Case Law Illustrations: Jurisdictions with an Explicit Revocation upon Divorce Statute

The UPC provides a bright-line standard for judges to utilize in interpreting the will of a testator who fails to change his will after a divorce.[45] The provision mandates that a divorce automatically revokes any and all dispositions favoring the former spouse.[46] A testator can provide for a former spouse only if this intention is specifically declared by the express terms of the will.[47] A number of state jurisdictions have adopted statutes that were influenced by this rule promulgated by the UPC.[48] A few states even adopted statutes that revoked the entire will, as opposed to just the provisions affecting the former spouse.[49] By choosing to follow the UPC's unambiguous standard, these states offer a clear and certain statute in an often-convoluted probate process.[50]

The Erie County Surrogate's Court of New York provides clear reasoning for adopting its unequivocal bright-line revocation upon divorce

44. *Id.* (emphasis added).

45. *See supra* Part I.B.

46. *See supra* note 14.

47. *See supra* note 14.

48. According to the ULC, Alaska, Arizona, Colorado, Hawaii, Idaho, Maine, Massachusetts, Michigan, Minnesota, Montana, Nebraska, New Jersey, New Mexico, North Dakota, South Carolina, South Dakota, U.S. Virgin Islands, and Utah have all enacted the current version of the Uniform Probate Code in its entirety, including § 2-804, which applies the revocation upon divorce doctrine. *Legislative Fact Sheet—Probate Code*, *supra* note 37.

49. *See, e.g.*, GA. CODE ANN. § 53-2-76 (West 1996). However, this Georgia law was replaced in 1996 by GA. CODE ANN. § 53-4-49, which provides that a divorce no longer revokes the testator's will completely, but rather results in the former spouse being treated as having predeceased the testator. See comments to § 53-4-49 for legislative history.

50. *See* Wilbanks, *supra* note 31, at 947 (noting that adoption of the UPC revocation upon divorce statute would "clarify unanswered questions in Vermont jurisprudence" regarding the effect of divorce on a will).

statute in *In re Will of Lampshire*.[51] This was a case of first impression, yet the court voiced strong support for the statute, noting that it was necessary in light of the fact that "the public is lax in making or revoking their wills."[52] The court also thought the statutory presumption towards revocation was preferable, as it required the testator to take the affirmative steps necessary to include the former spouse if so desired.[53] Here, the New York revocation upon divorce statute contained nearly the exact same language as UPC Section 2-804, in that, according to the Statute, the testator must "expressly provide[] otherwise."[54] The court found no alternate expressions of intention to include the former spouse and held the will revoked.[55]

Revocation upon divorce statutes have also been useful in determining the effect and impact of a revocation. The Court of Appeals of Oregon held in *In re Estate of Crohn*[56] that revocation of a will is not ambulatory, in that whether or not a will is revoked does *not* depend on the law in effect at the time of death, but rather depends on the law in effect at the trigger time of revocation—the time of divorce. Accordingly, at the time of divorce, the revocation of a will is "done and complete."[57] Once revoked, a will cannot be revived unless "new life is given to it."[58] Here, the testator was divorced in 1956, and, at the time, Oregon had enacted a statute revoking a testator's entire will upon divorce.[59] In July 1970, the state legislature repealed this statute and replaced it with one providing that divorce only revoked those

51. 292 N.Y.S.2d 578 (N.Y. Sur. Ct. 1968).

52. *Id.* at 579; *see id.* at 579–80 (acknowledging the argument that such a strong statute was unnecessary as a testator could simply alter his will after a divorce, the court still found this argument to be unconvincing).

53. *Id.* at 579.

54. *Id.* At the time, the statute read:

> "(a) If, after executing a will, the testator is divorced, his marriage is annulled or its nullity declared or such marriage is dissolved on the ground of absence, the divorce, annulment, declaration of nullity or dissolution revokes any disposition or appointment of property made by the will to the former spouse and any provision therein naming the former spouse as executor or trustee, unless the will expressly provides otherwise."

Id. at 579–80.

In 2008, New York enacted a new revocation upon divorce statute that even more closely adheres to the language set forth by the UNIF. PROBATE CODE § 2-804 (2011). *See* N.Y. EST. POWERS & TRUSTS LAW § 5-1.4 (McKinney Supp. 2015) and the Editor's Notes therein.

55. *In re* Will of Lampshire, 292 N.Y.S.2d at 580 (noting that "the court should not make a new will based on speculation as to what the testator might have intended" (quoting *In re* Estate of Imperato, 254 N.Y.S.2d 581, 584 (N.Y. Sur. Ct. 1964)).

56. *In re* Estate of Crohn, 494 P.2d 258 (Or. Ct. App. 1972).

57. *Id.* at 259 (quoting Estate of Berger, 243 P.2d. 862, 865 (Cal. 1926)).

58. *Id.*

59. *Id* at 258–59; *see* OR. REV. STAT. ANN. § 114.130 (West 2013) ("A will made by any person is deemed revoked by his or her subsequent divorce."). This statute has since been repealed and replaced by OR. REV. STAT. ANN. § 112.315 (2013).

will provisions *in favor* of the former spouse.[60] The testator died in September of 1970.[61] His will gave his entire estate to his former spouse's son by a prior marriage.[62] The court held that a revocation upon divorce is a "final and complete act."[63] Because the divorce automatically revoked the entire will at the immediate time of the divorce, it is of no concern that a subsequent statute would not have revoked the will in its entirety.[64] Revocation cannot be repealed or revived.[65] Simply stated, the court found that "what's done is done."[66]

Courts often utilize a straightforward and bright-line revocation upon divorce rule, particularly when faced with a set of contradictory facts. In *In re Estate of Pekol*,[67] the testator executed her will in 1957, bequeathing all her real and personal property to her husband.[68] Although they divorced in 1961, the couple cohabited for thirteen years prior to her death in 1983.[69] The Appellate Court of Illinois for the Third District held the testators will to be revoked, finding that the divorce decree "forever barred" her ex-husband from claiming any part of her estate.[70] Despite the couple's thirteen-year-long cohabitation, the court asserted that there was "strong public policy" favoring the institution of marriage.[71]

Similarly, the Missouri Court of Appeals in *In re Estate of Pence*[72] found Missouri's clear revocation standard instructive. In 1988, the couple signed a will that included a provision not to revoke the will unless both parties agreed to it.[73] Thirty years later, in 2008, the couple divorced.[74] The testator then died in 2009.[75] The court found that the revocation upon divorce statute applied and the will was revoked.[76] Although the parties seemingly had entered into a "contract" not to revoke the will, the contract did not include any provision that clearly contemplated the potential for di-

60. *In re Estate of Crohn*, 494 P.2d at 259; *see* OR. REV. STAT. ANN. § 112.315 (2013) ("Unless a will evidences a different intent of the testator, the divorce or the annulment of the marriage of the testator after the execution of the will revokes all provisions in the will in favor of the former spouse . . . .").

61. *In re Estate of Crohn*, 494 P.2d at 259.

62. *Id.* at 258.

63. *Id.* at 259.

64. *Id.* at 260.

65. *Id.*

66. WILLIAM SHAKESPEARE, MACBETH, act 3, sc. 2.

67. 499 N.E.2d 88 (Ill. App. Ct. 1986).

68. *Id.* at 89.

69. *Id.*

70. *Id.*

71. *Id* at 90.

72. 327 S.W.3d 570 (Mo. Ct. App. 2010).

73. *Id.* at 572.

74. *Id.*

75. *Id.*

76. *Id.* at 575–76.

vorce.[77] The court relied on the state legislature's decision that "a divorce should wipe the slate clean as to the divorced spouse, without the testator having to go to the time and expense of making a new will."[78] The court also observed that, in almost every instance, a divorced person would not desire a bequest to the former spouse to remain in effect.[79] Therefore, such a bequest would often result in an "inequitable windfall in favor of [the former spouse]."[80] The court found that a divorce should instead have the effect of "cutting off" all of the former spouse's claims to the testator's estate.[81]

Particularly when faced with indeterminate and unusual relationships, courts are prone to rely on an express and unequivocal statute. For example, the District Court of Appeal of Florida in *Bauer v. Reese*[82] revoked a husband's will that was executed after the couple's first marriage—even though the couple had later remarried one another![83] The court found the Florida statute to be "clear, concise and unambiguous."[84] Furthermore, the statute was enacted with a specific legislative purpose "unquestionably directed toward curing the incongruous situation . . . [wherein a] death[] occur[s] before the testator has had an opportunity following divorce to reframe or destroy the existing will."[85] Therefore, in light of the divorce, the court held the will to be null and void, and the decedent was left to die intestate.[86]

A bright-line standard can also facilitate straightforward resolutions to complex probate disputes. *Gibboney v. Wachovia Bank, N.A.*[87] is one such example. In *Gibboney*, the couple was married in 1975 and divorced in 1996.[88] The testator executed a will in 1973, which set forth four mutually exclusive tiers of dispositions.[89] The first of these dispositions provided for his "surviving wife, lawfully married to decedent on his death date" and the fourth of which stated, "if none of the above persons survive decedent, to

77. *Id.* at 574–75.

78. *Id.* at 574 (quoting *In re* Bloomer's Estate, 620 S.W.2d 365, 366 (Mo. 1981)).

79. *Id.*

80. *Id* at 575. The court also notes that the "law favors a statutory interpretation that tends to avert unreasonable results." *Id.* (quoting Miles v. Lear. Corp., 259 S.W.3d 64, 75 (Mo. App. E.D. 2008)).

81. *Id.* at 576.

82. 161 So. 2d 678 (Fl. Dist. Ct. App. 1964).

83. *Id.* at 679, 681.

84. *Id.* at 680.

85. *Id.* The court further reiterated the UPC's preference for clear expressions of intent when it stated, "if [the testator] desires the divorced spouse to participate in his estate, the better rule is to require a new will to be executed to that effect." *Id.*

86. *Id.* at 81.

87. 622 S.E.2d 162 (N.C. Ct. App. 2005).

88. *Id.* at 164.

89. *Id* at 163–64.

[name of his former spouse]."[90] The North Carolina revocation upon divorce statute states that "unless otherwise *specifically provided*," the statute revokes all provisions in the will in favor of the former spouse.[91] The court found that the residual disposition specifically providing for the former spouse did not "expressly provide[]" for the case of a divorce.[92] Absent any such express statement, the court found the will to be revoked.[93] Although still not as explicit as the UPC's revocation upon divorce statute, the statute addressed in *Gibboney* possesses the same bright-line nature.

2. Case Law Illustrations: Revoked, Even Absent a Revocation upon Divorce Statute

In a number of other jurisdictions, state legislatures have not provided an explicit revocation upon divorce statute. Even in the absence of such a statute, courts often hold that a divorce will revoke a testamentary provision in favor of the testator's former spouse. In this situation, courts are prone to rely on both the couple's divorce property settlement[94] and the state's general statute providing for revocation upon subsequent change of circumstances. Even without a statute explicitly providing for revocation upon divorce, it is interesting to note that the judicial outcomes remain largely consistent with the UPC's guidelines. This trend is significant as it suggests that an absolute revocation post-divorce is the outcome to which judicial courts seek. Full adoption of the explicit UPC revocation upon divorce statute would therefore simply minimize any isolated instances of autonomous judicial discretion, as well as enhance consistent results and create statutory authority for judicial decisions.

Without a revocation upon divorce statute, courts may still attempt to revoke a will post-divorce. In *Caswell v. Kent*,[95] the Supreme Judicial Court of Maine relied on Maine's general revocation upon subsequent changes statute[96] and recent decisions of their fellow courts to revoke the

90. *Id.*

91. *See* N.C. GEN.STAT. § 31-5.4 (LexisNexis 2013) (emphasis added).

92. *Gibboney*, 622 S.E.2d at 165.

93. *Id.* at 165.

94. *See* Kristen P. Raymond, *Double Trouble—An Ex-Spouse's Life Insurance Beneficiary Status & State Automatic Revocation upon Divorce Statutes: Who Gets What?*, 19 CONN. INS. L.J. 399, 421–23 (2013) (noting that some jurisdictions hold that a property settlement agreement essentially "wipes the slate clean" between divorcing spouses, revoking all benefits, while others hold that the determination of whether a property settlement agreement suffices for revocation depends on such factors as the wording and express terms of the agreement).

95. 186 A.2d 581 (Me. 1962).

96. *Id.* at 581. The statute states that a will could be revoked by operation of law when "subsequent changes in the condition and circumstances of the maker" occurred. *Id.* The court noted that while divorce, if anything, should be considered a "subsequent change" that would properly and realistically produce a revocation, the "courts have held with almost complete uniformity that

testator's will.[97] The court concluded that, when a divorce involves a property settlement, a conclusive presumption arises that the testator intended a revocation of the testamentary provision favoring his former spouse.[98] In making this assumption, the court noted that "it is so rare and so unusual" for a divorced testator to desire or intend that his former spouse benefit under his will.[99] Furthermore, the court found that it is reasonable for the court to require a divorced testator to make such an atypical desire and intention manifestly evident either by a properly executed codicil to the current will or by the execution of a new will.[100] The court further declared that its adoption of an "absolute and irrebuttable statutory revocation" is necessary in order to eliminate excessive litigation, uncertainty, and unnecessary confusion.[101] This would provide both protection, as well as notice to the ordinary testator, that affirmative action is required if he desires to include his former spouse as a beneficiary.[102]

Similarly, at the time *Rankin v. McDearmon*[103] was decided, the state of Tennessee had no statute governing the revocation of wills, nor any prior case law governing the question.[104] The Court of Appeals of Tennessee, however, did note the firmly established common-law doctrine of implied revocation when applied to a marriage coupled with the birth of child.[105] The court analogized and held that a divorce, coupled with a property settlement, should have a similar result.[106] Because a testator did not anticipate these events at the time of his will execution, the court found that a

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divorce alone, unaccompanied by a property settlement, will not produce a revocation by operation of law." *Id.* at 582.

97. *Id.* at 584.

98. *Id.*

99. *Id.* at 582–83.

100. *Id.* The court also relied on the language of *Lansing v. Hayes*, wherein the majority stated: "To hold the will unrevoked under these circumstances would be repugnant to that common sense and reason upon which law is based. . . . Such disposition of his property . . . would be unusual, and contrary to common experience." *Id.* at 582 (quoting *Lansing v. Hayes*, 54 N.W. 699, 701 (Mich. 1893).

101. *Id.* at 584.

102. *Id.* (predicting that "incidents of such desire and intention will be rare indeed").

103. 270 S.W.2d 660 (Tenn. Ct. App. 1953).

104. *Id.* at 662. Tennessee has since adopted a revocation upon divorce statute; effective 2007. *See* TENN. CODE ANN. § 32-1-202 (LexisNexis 2007).

105. *See Rankin*, 270 S.W.2d at 662–63 ("[M]arriage and birth of a child after the execution of a written will will constitute an implied revocation of such will . . . ."). The court also noted:

> [H]ere the property rights of the parties to a divorce action have been settled in contemplation or anticipation of a divorce, such a settlement followed by a divorce impliedly revokes a prior will of one spouse in favor of the other, at least as to the legacies or devises bequeathed the spouse. Such circumstances have been held conclusive of revocation rather than as merely raising a rebuttable presumption of revocation.

Id. at 663 (quoting 57 AM. JUR. 371 *Wills* § 536 (1953)).

106. *See id.* at 663 (clarifying that a marriage or the birth of a child alone will not constitute an implied revocation; equally, a divorce or a property settlement would not suffice).

conclusive presumption should exist that the testator would not want his will to stand after these events occurred.[107] Here, the couple was married for twenty-three years before obtaining a divorce, during which the couple executed a property settlement.[108] Because these two events reflect such a significant change in the domestic life of the testator, the court found that a divorce coupled with a property settlement should "sever[] all ties" between the spouses.[109]

Likewise, in *In re Bartlett's Estate*,[110] the Supreme Court of Nebraska reiterated the "well-established rule . . . that a divorce, coupled with a settlement of the property rights of the parties, is such a change of circumstances as to work an implied revocation."[111] The court found that the Nebraska statute extended revocation to cases beyond merely those covered by common law.[112] As such, the court held that a statute calling for revocation upon a changed set of circumstances is a "rule of justice and a principle that the court should recognize and apply, whenever the change in the conditions or relations of the testator should . . . raise a clear presumption that the testator would have desired to make a revocation, had his attention been directed to it."[113] Accordingly, the court found that any claim or share that a former spouse may have in a testator's estate is destroyed.[114] The dissent placed great weight on the specific facts of the case—here, the divorce resulted from the husband's breach of marriage vows—and claimed that there was a strong argument that the husband did intend to keep his former spouse in the will.[115] However, if the legislature were to adopt a bright-line rule, such as the UPC's revocation upon divorce statute, rather than rely on

107. *Id.*

108. *Id.* at 661.

109. *Id.* at 663.

110. 190 N.W. 869 (Neb. 1922).

111. *Id.* at 869.

112. *See id.* at 870 ("The statute, instead of attempting to preserve and provide for those specific revocations allowed at common law, we believe, sought to preserve and perpetuate the underlying principle only upon which those revocations were based." That is, for women, the marriage alone would work to revoke her will and, in the case of a man, marriage and birth of issue would have been necessary to revoke his will); *see also* Hertrais v. Moore, 88 N.E.2d 909, 910 (Mass. 1949), and *In re* Battis, 126 N.W. 9, 11 (Wis. 1910), where the courts discussed what constituted implied revocation at common law.

113. *In re Bartlett's Estate*, 190 N.W. at 870 (finding this presumption to be clear in the case of a divorce and claiming that "[i]t is beyond reason to suppose that a husband, after a divorce and settlement of property rights, should still desire that a will, which he had previously made in favor of his wife, should continue, and that his estate should pass to her under the will, to the exclusion of his natural heirs").

114. *Id.*

115. *Id.* at 871 (Aldrich, J., dissenting); see *infra* Part II.B *and* Part II.C. when considering the dissent's interpretation; see also Part II.A. for alternative options that the testator could have utilized in order to effectuate this presumed intent.

a discretionary standard, the court's dissent could have avoided such a complex, fact-driven inquiry.

In *In re Battis*,[116] the Supreme Court of Wisconsin was able to avoid such an inefficient analysis. Although the former wife offered evidence that the testator maintained a friendly relationship with her, showed her affection through his actions, and publicly declared that he executed a provision in his will for her, the court still held the provisions in the will relating to the former spouse had been revoked.[117] The court asserted that a divorce and subsequent property settlement produces a "complete destruction of [the couple's] legal and moral relations and consequent obligations and duties."[118] Not only does a divorce decree make a former husband and wife "strangers" to one another, but the property settlement also operates to "discharge" all moral and legal duties from one spouse to the other.[119] Therefore, an absolute revocation of any provisions favoring the former spouse should be revoked.[120]

Lang v. Leiter[121] illustrates the complications that can arise when relying on judicial interpretation and a separate, unrelated document to probate a will. In *Lang*, the Court of Appeals of Ohio in Wood County reiterated the rule that a divorce, coupled with a full settlement of property rights, impliedly revoke a will.[122] In this case, however, the couple had not executed a complete and full property settlement agreement, but rather, a separation agreement that only provided for a restoration of their individual and separately owned property.[123] Thus, the court found no "voluntary arms-length separation agreement" that implied an intent to wholly revoke the will and reversed the revocation.[124]

3. Case Law Illustrations: If No Explicit Statute, No Revocation

Many states have not codified the doctrine of revocation upon divorce. Although some of these jurisdictions generally reflect judicial outcomes that are similar to that which would occur under the UPC,[125] others hold

116. *In re* Battis, 126 N.W. 9 (Wis. 1910).

117. *See id.* at 12 ("A divorce and settlement of their property rights between husband and wife operates ipso facto to revoke his will previously made, and no subsequent act of the testator not accompanied by the solemnities requisite for the making of a valid will, will revive it." (quoting Wirth v. Wirth, 113 N.W. 306, 307 (Mich. 1907))).

118. *Id.*

119. *Id.*

120. *Id.*

121. 144 N.E.2d 332 (Ohio 1956).

122. *Id.* at 333–34.

123. *Id.* at 332, 334.

124. *Id.* at 334.

125. *See supra* Part I.C.2.

that a divorce, with or without a property settlement, does not automatically revoke the testamentary provisions in favor of the former spouse.

For example, in *Hertrais v. Moore*,[126] the couple received an absolute decree of divorce that included a full property settlement.[127] The Massachusetts state legislature had enacted a general statute providing for revocation of the entire will in the case of subsequent changes in the condition or circumstances of the testator.[128] Nonetheless, the Supreme Judicial Court still held that the testator's will favoring the former spouse remained valid and was not revoked.[129] The court relied on the common law interpretation of the statute, finding that a revocation of the entire will is "limited to [those] very small number of cases at common law."[130] Stressing that it would be a serious matter to invalidate a will based on the presupposed changed intention of a "reasonable testator," the court found it more favorable to avoid an absolute revocation.[131] The court also warned against explicitly including divorce in its general revocation statute—presaging that other additions could be adopted that would expose testators to the risk of unintended revocation.[132]

In contrast, the Supreme Court of Michigan in *In re Estate of Mercure*[133] found that an implied revocation arises upon a change of the testator's condition or circumstances.[134] This decision reflects the "natural" presumption that the testator intended to revoke these provisions of his will.[135] However, the court held that this was not a "conclusive presumption," nor should the doctrine of "conclusive presumption" even exist.[136] Instead, when faced with sufficient evidence tending to rebut the presumption of revocation, all such evidence must be considered before a court determines that a will is revoked.[137] The court held that any simple change of condition or circumstances alone should not automatically revoke a will.[138]

126. 88 N.E.2d 909 (Mass. 1949).

127. *Id.* at 909.

128. *Id.* at 909–10. Massachusetts has since repealed this statute. See MASS. GEN. LAWS ANN. 190B § 2-508 (West 2012) for the current version.

129. *Hertrais*, 88 N.E.2d at 912.

130. *Id.* at 911. *See supra* note 105. The court also noted that previous case law established that the death of the wife of the testator, which occurred prior to testator's own death, did not qualify as a change in condition or circumstances such to revoke his will. *Hertrais*, 88 N.E.2d at 911 (citing Bennett v. Brown, 110 N.E. 266 (Mass. 1915)).

131. *Hertrais*, 88 N.E.2d at 912.

132. *Id.*

133. 216 N.W.2d 914 (Mich. 1974).

134. *Id.* at 919.

135. *Id.* at 918.

136. *Id.* at 916–17, 919. The court noted its agreement with the finding of an implied revocation in *Lansing v. Haynes*, 54 N.W. 699, 700 (1893), which decided that a divorce and property settlement raised a strong presumption that there was an intention to revoke the prior will.

137. *In re Estate of Mercure*, 216 N.W.2d at 919.

138. *Id.*

In *In re Estate of Mercure*, the testator drafted a will devising his estate to his soon-to-be former spouse.[139] He executed this will one day after filing the property settlement, but two months prior to the final divorce decree.[140] Although his former wife went on to marry another man, the three individuals became cordial neighbors, interacting socially and helping one another financially.[141] Additionally, the testator carried an identification card requesting that his former wife be the contact notified in the case of an emergency.[142] The court found that the accumulation of this circumstantial evidence was sufficient to rebut the presumption of revocation and therefore, found the will to be valid.[143]

In the *Mercure* opinion, the court expressed a hope for future legislation that is particularly illuminating. The court not only declared that a statutorily enacted revocation doctrine would increase efficiency, but it also asserted "[o]ur duty would be different," implying that the court could have reached a different conclusion in this case, if not for the lack of such a statute.[144] Stating that a legislatively enacted statute would have "the advantage of eliminating uncertainty and minimizing litigation," the court maintained that the status of a doctrine established by judicial common law can only be maintained by the discretion of the judiciary.[145]

4. Case Law Illustration: Total Abolishment of Revocation upon Change in Marital Status

Over the past century, a small minority of jurisdictions abolished their marital revocation statutes. However, in more recent years, the trend has come full-circle; state legislatures have once more returned to the revocation statutes, concluding that the dissolution of marriage suffices as a significant enough change in circumstance to revoke a testator's will.

This process is illustrated in *Lee v. Central Nat. Bank & Trust Co.*,[146] in which the court discussed the reasons for the legislature's recent decision to abolish the revocation statute.[147] Prior to 1965, the Illinois revocation statute provided that a change in marital status revoked a will.[148] However,

139. *Id.* at 916.

140. *Id.*

141. *Id.* The court's opinion notes how the three ate meals and participated in social activities together, the testator paid his former wife's telephone bills, and the former wife occasionally cared for the testator in times of sickness. *Id.*

142. *Id.*

143. *Id.* at 919.

144. *Id.* at 916.

145. *Id.* (noting that a legislatively enacted statute cannot be found to be a "wholly unreasonable law" and thus, "would withstand attack as an arbitrary or capricious statute").

146. 296 N.E.2d 81 (Ill. App. Ct. 1973), *rev'd on other grounds*, 308 N.E.2d 605 (Ill. 1974).

147. *Id*. at 83.

148. *Id*.

in 1965, the Illinois legislature decided to alter the revocation statute to provide that "[n]o will or any part thereof shall be revoked by any change in the circumstances, condition or marital status of the testator."[149] The court noted that the legislature's intent was to "rectify inequitable situations such as the case before this court."[150] This outlook was short-lived. The Illinois legislature reversed this decision in 1975, thereby reinstating the revocation doctrine when applied to the dissolution of marriages.[151]

D. Case Law Model: Nichols v. Suiter*—A Case of Mix-Up in Maryland*

A recent Maryland Court of Appeals case, *Nichols v. Suiter*,[152] provides an illustrative example of the complications that arise when a state fails to fully adopt the bright-line UPC standard. In *Nichols*, the couple married in 1965, separated in 1996, and divorced in 2006.[153] As a part of the separation agreement, the couple agreed to waive all rights to the other's estate.[154] However, the couple also provided that either party may still bequeath any part of his or her estate to the other.[155] Three years prior to the final divorce, the decedent executed his will, leaving the entire residue of his estate to his former wife, indicated by her specific name.[156] The decedent died shortly after the will was finalized in 2006, and his will was admitted to probate.[157] The Maryland revocation statute states that a divorce will revoke all provisions in the will relating to the former spouse "unless

149. *Id.*

150. *Id.* Here, the decedent had executed a will in 1949. In 1962, she married. Prior to marriage, the couple entered into a verbal agreement to disclaim all interest in any property the other owned. After their marriage, the couple recognized this agreement in a written agreement executed in 1964. The court found, reluctantly, that the ante-nuptial agreement was void based on the prior revocation statute. *Id.* at 82, 84.

151. The current Illinois revocation statute reads, in pertinent part:

> No will or any part thereof is revoked by any change in the circumstances, condition or marital status of the testator, except that dissolution of marriage or declaration of invalidity of the marriage of the testator revokes every legacy or interest or power of appointment given to or nomination to fiduciary office of the testator's former spouse in a will executed before the entry of the judgment of dissolution of marriage or declaration of invalidity of marriage and the will takes effect in the same manner as if the former spouse had died before the testator.

755 ILL. COMP. STAT. ANN. 5/4-7 (West 2007).

152. 435 Md. 324, 78 A.3d 344 (2013).

153. *Id.* 328–29, 78 A.3d at 346–47.

154. *Id.*

155. *Id.*

156. *Id.* at 329–330, 78 A.3d at 347. Instead of simply identifying the bequest as to "my wife," the will provided, in pertinent part, "All the rest, residue and remainder of my estate and property whether real, personal or mixed . . . I give, devise and bequeath unto Virginia Lee Suiters, if she survives me." *Id.* at 355, 78 A.3d at 342.

157. *Id.* at 330, 78 A.3d at 347.

otherwise provided in the will or decree."[158] The Maryland Court of Appeals reversed the lower court's decision and found that the statute's language was clear and unambiguous.[159] Accordingly, the separation agreement's general statement that either spouse could provide for the other, and the fact that the decedent did, in fact, execute a will leaving parts of his estate to his former spouse, without referencing her status as "my wife," did not suffice to satisfy the statute's requirement that the a testator must "otherwise provide[] in the will or decree" if he wishes to leave his estate to a former spouse[160]

Nichols v. Suiter is just one illustration of the contradictions and confusions that can occur when a state partially adopts the UPC's clear and uniform language.[161] However, this issue is not restricted to just the state of Maryland.[162] Problems of ambiguity, contradictions, or a total lack of statutory guidance are ubiquitous and are found across the jurisdictions of the United States.

II. ANALYSIS

The current failure of some states to adopt the revocation upon divorce doctrine has led to many inequitable and inconsistent judicial outcomes.[163] The frequency with which this issue arises has also created a call for legislative action.[164] Due to the growing complexity and fast pace of modern life, individuals are often lax in modifying their wills to properly reflect new, post-divorce intentions.[165] In addition, testators often suffer from a misunderstanding that the divorce itself automatically revokes the will and effects the requisite re-designation.[166] Unfortunately, this imposes a cost on all of the parties to the probate process. First, without a consistent and express statutory guideline, courts are faced with an undesirable ultimatum:

158. *See* MD. CODE ANN., EST. & TRUSTS § 4-105 (West 2014).

159. *Nichols*, 435 Md. at 340, 78 A.3d at 353.

160. *Id.* at 340, 78 A.3d at 353–54. The court does acknowledge, "While the collective effect may be to permit an inference as to the testator's intent, it does not establish that intent or even clearly and unequivocally state it." *Id.* 340, 78 A.3d at 354.

161. UNIF. PROBATE CODE § 2-804(b) (2001). This section states, in pertinent part: "[e]xcept as provided by the *express terms* of a governing instrument" (emphasis added).

162. *See infra* Parts I.C.1–4.

163. *See supra* Parts I.C.1–4.

164. *See generally* David, *supra* note 8; Wilbanks, *supra* note 31; Raymond, *supra* note 92; Lynn, *infra* note 174; *and* Soliman, *infra* note 202.

165. *See* David, *supra* note 8, at 412 (noting that simple difficulties of modern life "often work to prevent a testator from properly expressing his or her intent by modifying a will or will substitute").

166. *See* Raymond, *supra* note 94, at 416 (asserting that jurisdictions that adopt a full and automatic revocation statute understand that a testator's failure to change his will does not reflect an intention to bequest his estate to an ex-spouse, but rather, is likely the result of an "inadvertent misunderstanding" about the probate process).

permit the court to infer testator intent (leaving whole discretion to individual probate judges) or mandatorily forbid the court from straying from the will's express (and outdated) terms.[167] This often results in inconsistent outcomes.[168] Second, the surviving spouse and family are often left with nothing.[169] Third, the testator also suffers in that his or her updated intentions post-divorce may not be fulfilled.[170] Lastly, there is a strong constituent consensus and prevailing societal policy preference for clear, uniform, and consistent statutory law.[171]

The UPC's revocation upon divorce statute offers a solution. The revocation statute provides for the express revocation of all dispositions and provisions favoring the testator's former spouse, "except as provided by the express terms" of the governing instrument.[172] The states' legislatures should universally adopt the statutory provisions set forth in the Uniform Probate Code's revocation upon divorce statute, Section 2-804. This would promote the efficient resolution of probate administration, protect the common testator who fails to change his will upon divorce, and better effectuate the new intentions of the divorced testator.

A. Efficiently Resolve Estate and Probate Administration

There is an underwhelming amount of statutory and judicial guidance regarding the impact of wills post-divorce. Adoption of the UPC's revocation upon divorce statute would reduce unnecessary legal challenges, as individuals could rely on a state's explicit statutory guidance.[173] The current ambiguity and inconsistency in probate courts enables and encourages litigation, with all its attendant expenses, costs, and delays.[174] Because there is an unquestioned universal public interest in preventing litigation, a consistent revocation upon divorce statute would offer "welcome guidance" to testators, beneficiaries, practitioners, and judges.[175] Under such a statute, individuals could ensure the proper distribution of their property, judges would have a standard to apply to the more complex and complicated pro-

167. *See infra* Part II.A.

168. *See* cases cited *supra* Part I.C.1–4.

169. *See infra* Part II.B.

170. *See infra* Part II.C; *see* David, *supra* note 8, at 412 (pointing out that, more often than not, a testator's intentions post-divorce will often differ substantially from those intentions held while happily married).

171. *See infra* Part II.D; *see* Raymond, *supra* note 94, at 424–25.

172. *See supra* note 14 for the full text of UNIF. PROBATE CODE § 2-804 (2001).

173. Raymond, *supra* note 94, at 403; *see also* David, *supra* note 8, at 393 (noting that if Tennessee had fully adopted the UPC revocation provisions, certain issues "could have been disposed of much more quickly").

174. *See* Robert J. Lynn, *Will Substitutes, Divorce, and Statutory Assistance for the Unthinking Donor*, 71 MARQ. L. REV. 1, 30 (1987) (mentioning that there is also an accompanying public interest in honoring the decedent's intent for his or her estate).

175. Wilbanks, *supra* note 31, at 917.

bate cases that are unable to be administered under the statutory guidelines, and the intended beneficiaries would receive their correct and intended share.[176]

Although adoption of the UPC's revocation upon divorce statute would efficiently eliminate a large portion of unnecessary litigation, such a complete abolition could come at a cost. Because the UPC provides for an automatic revocation at the time of the divorce decree, a court would be unable to personalize judicial remedies when faced with unique circumstances. Therefore, there may be times where Section 2-804 may not best serve the testator's true intent. For example, in *Nichols v. Suiter*, the former spouse argued that her deceased ex-husband's intent was to bequeath the entirety of his residuary estate to her.[177] However, because the will lacked specific language stating that the testator intended this bequeath to remain with his spouse, even post-divorce, the Maryland Court of Appeals found the gift to be void.[178] Such a fixed hard-and-fast rule could prove detrimental when applied to convoluted and emotionally driven probate situations.

However, it is important to note that the UPC's revocation upon divorce statute offers only a "default rule."[179] This rule counterbalances the problem of a stale will in the absence of a testator's specific instruction otherwise.[180] A testator still has several options in order to provide for a former spouse. First, a testator may always write into his or her will that assets should still benefit a spouse regardless of the dissolution of the legal marriage.[181] Second, a testator can simply execute another will after the divorce devising property to whomever he or she desires—including redesignating a former spouse as a beneficiary.[182] Because the revocation upon divorce provisions only apply to wills executed before a divorce, a testator could still provide for a former spouse, without any concern that these dispositions of property will be revoked.[183] Third, in a testator's original draft of his or her will, he or she can generally state that the revocation upon divorce statute should have no effect upon the disposition of his or her assets.[184] Although it could be argued that these options put an undue burden

176. Wilbanks, *supra* note 31, at 903. The author notes that the adoption of the UPC revocation statute would "clarify unanswered questions" in Vermont, where full adoption of the UPC's revocation upon divorce statute has not yet been adopted. *Id.* at 947.

177. 435 Md. 324, 78 A.3d 344 (2013); *see* discussion *supra* Part I.D. Based on the facts of the case, this argument does have some merit.

178. *Nichols*, 435 Md. at 340, 78 A.3d at 353–54.

179. David, *supra* note 8, at 398–99.

180. *Id.*

181. *Id.* at 411.

182. *Id.*

183. *Id.*

184. *Id.*

on the testator, the UPC's revocation upon divorce doctrine provides an unrivaled remedy that will produce "more equitable results more of the time."[185]

B. Protect the Common Testator from Unintended Consequences

The UPC's revocation upon divorce statute provides a "default plan" based on the common and frequent situation wherein a divorced testator fails to amend his or her estate plan post-divorce.[186] This failure to change a will can be due to a myriad of reasons: simple forgetfulness, sudden and unexpected death, failure to comply with proper procedure, bad legal advice, or daily responsibilities.[187] Furthermore, an everyday layperson, uneducated and unaware of the complicated intricacies of probate law, might assume that a divorce, in and of itself, would automatically effect a change in the distribution of his or her estate.[188] Regardless of the reasoning behind the testator's failure to properly modify his will, substantial inequities can result from this failure.[189]

In addition, although the majority of the court decisions within jurisdictions without explicit revocation statutes fortuitously resulted in a revocation, the court's opinion often noted that, in the absence of a property settlement or general statute, the court would not have reached such a result.[190] This is problematic. For instance, when following this logic, if a couple fails to settle their property in its entirety or if a state fails to create a general revocation statute, no revocation would occur. Often, this would leave assets to a former spouse—a situation the testator typically would not have intended nor desired.

The UPC revocation upon divorce statute protects the testator from these unintended consequences by providing a default rule that aligns with the intent of the majority of individuals and ensures the proper distribution of the testator's assets.[191] The revocation statute "offer[s] more protection to the divorced decedent" than the ambiguous statutes currently enacted in

185. *Id.* at 411–12.

186. *Id.* at 398–99, 384.

187. *Id.* at 410–11 (quoting Mark Davis, Note, *Life Insurance Beneficiaries and Divorce*, 65 TEX. L. REV. 635, 653 (1987)). David notes that this failure to amend a will is an "all-too-common circumstance[]" that often leads to inequitable results. *Id.* at 411.

188. Raymond, *supra* note 94, at 416 ("[A]n insured's failure to make a beneficiary change does not necessarily mean he intended to give the proceeds to his ex-spouse, but rather could have resulted from an inadvertent misunderstanding about the nature of the divorce process in that the divorce itself did not effect a change in beneficiary status."); *see also* David, *supra* note 8, at 399–400 (discussing the UPC's revocation provisions relating to a former spouse's relatives and noting that a testator "would likely assume that if the law revokes provisions to a former spouse, it would also revoke provisions to a former spouse's relatives under the same logic").

189. Raymond, *supra* note 94, at 416.

190. *See supra* Part I.C.2.

191. *See infra* Part II.C.

some states and far more protection for decedents residing in those jurisdictions with a total lack of any revocation statute.[192] A bright-line rule would also permit estate planners and practitioners to quickly eradicate mistaken beliefs and provide testators with a guaranteed way to achieve their personal intended plan.

C. Properly Effectuate and Execute Testator Intent

The primary goal of probate courts is to "ascertain and give effect to the intent of the testator."[193] Typically, a testator would not intend for a former spouse to remain a beneficiary after his divorce.[194] Usually a "divorce itself" will provide enough evidence of such testator intent.[195] However, without clear statutory guidance, the judiciary remains free to either adhere to the express terms of the outdated will or infer the updated testator intent. The UPC's revocation upon divorce statute resolves this ambiguity and alleviates the pressure on the judiciary by providing a vehicle that automatically determines testator intent.

Unfortunately, when faced with unusual circumstances, the conclusive nature of the UPC revocation upon divorce statute can simultaneously become a wholly erroneous presumption. For example, in *In re Estate of Mercure*, the former couple remained close neighbors—interacting hospitably and assisting one another financially and socially.[196] Although the court agreed that there was a "natural presumption" that a testator would intend to rescind his bequest to a former spouse, it also found the relationship to be so unique that the circumstantial evidence was sufficient to rebut this presumption.[197] *In re Estate of Mercure* is an unusual set of circumstances wherein the court was able to deliver an equitable judicial remedy. However, the court's opinion still asserts its desire for a statutorily enacted revocation statute in order to eliminate uncertainty and minimize litigation.[198] The

192. David, *supra* note 8, at 395. The author also notes that the "growing complexity and fast pace of life often work to prevent a transferor from properly expressing his or her intent." *Id.* at 412.

193. George Chamberlain, Annotation, *Cause of Action to Probate Will Presumptively Revoked or Altered as Result of Marriage, Divorce, Birth, or Adoption*, 28 CAUSES OF ACTION 563, § 2 (2014).

194. *See* Raymond, *supra* note 94, at 412 (asserting that the Colorado state legislature, in adopting a revocation statute nearly identical to the UPC's Section 2-804, understood that a testator's failure to properly amend his insurance policy to remove his ex-spouse as a beneficiary was not a calculated intention but a mere oversight); *see also* Lynn, *supra* note 174, at 18 (noting that there is a legislative assumption that a testator's failure to change his or her will is a mere matter of oversight and not an intentional decision).

195. Raymond, *supra* note 94, at 416 (stating that the failure to amend a testator's will "constituted a mere oversight because the execution of a final divorce decree exhibited the insured's true intent to revoke the ex-spouse's beneficiary status").

196. *In re* Estate of Mercure, 216 N.W.2d 914, 916 (Mich. 1974); *see supra* Part.I.C.3.

197. *Id.* at 918–19.

198. *Id.* at 916.

court recognized that, without such legislation, the future of estate law is left to the discretion of the judiciary.[199] The UPC's revocation upon divorce statute would provide the definitive guidance for which courts are seeking.

In addition, it is significant to note that the UPC revocation upon divorce statute is only the "default rule."[200] The statute still allows for personalization of a testator's estate. For example, the testator in *In re Estate of Mercure* could have simply added a new amendment to his will, drafted an entirely new will, or drafted his original will to specifically state that a former spouse should still benefit even post-divorce—which would have avoided the probate litigation process entirely.[201]

Because the UPC offers a set of general guidelines, the UPC drafters recognized that divorce *usually* constitutes "such a detrimental breakdown in a relationship that automatic alterations to a divorced spouse's testamentary plan were needed."[202] Clearly, the principal purpose of executing a will is to ensure that the proceeds of one's estate go to the correct beneficiary.[203] Without a provision providing for an automatic revocation upon divorce, these proceeds may end up in the hands of an ex-spouse—contrary to testator intent. State legislators need to recognize that the realities and complications of modern life necessitate the adoption of a revocation upon divorce statute in order to meet the needs of their citizens.[204] States need to acknowledge changing family dynamics[205] and adopt "rules that more accurately reflect the probable intent of decedents and the complex relationships of the twenty-first century."[206] The UPC's revocation upon divorce statute provides a default rule that proves advantageous for the majority of testators, as well as simultaneously allows a testator with intentions that are distinct from the majority to personalize his will accordingly.

199. *Id.*

200. David, *supra* note 8, at 398–99; *see also supra* Part II.A.

201. Additionally, it should be noted that the testator executed his probated will just two months prior to the divorce decree and one day after filing the property settlement. *In re Estate of Mercure*, 216 N.W.2d at 916.

202. Suzanne Soliman, *A Fair Presumption: Why Florida Needs a Divorce Revocation Statute for Beneficiary-Designated Nonprobate Assets*, 36 STETSON L. REV. 397, 400 (2007). The author also notes that "[i]ndividuals' tendency towards recalcitrance in creating or revising their wills also prompted the reform." *Id.*

203. Raymond, *supra* note 94, at 424.

204. Wilbanks, *supra* note 31, at 949 (noting that the "justification for change" lies in the need to better facilitate and effectuate a decedent's intent, Wilbanks believes this purpose can best be accomplished by simplifying the will-drafting process).

205. *See generally* WANG & PARKER, *supra* note 1.

206. Wilbanks, *supra* note 31, at 949 (noting also that the "justification for change lies . . . in the failure of existing Vermont law to meet the needs of its citizens").

D. Public Policy Preference for Clear, Uniform, and Consistent Statutory Law

There is a strong and universal public policy preference for clear, uniform, and consistent statutory law. Unfortunately, in regards to probate jurisprudence, many state legislatures are falling short of this objective.[207] Many experts in American probate law criticize the lack of consistency both between and within state courts.[208] Among these same experts, however, there is near universal agreement that the UPC would offer clear and express guidelines to eradicate the inconsistencies and confusion. The UPC provides "much needed clarity and certainty in the law," and is "attractive in its simplicity."[209] Because probating an estate has the potential to have significant implications for individuals, rules governing estate probate must be "clear, strictly construed, and consistently applied."[210] In addition, because the revocation issue only arises after the testator has died and can no longer articulate his intent, a rule must be able to prevent confusion both before death (when the testator is drafting his or her will), and after death (in deciphering his intent).[211] The UPC's revocation upon divorce doctrine offers the perfect balance of straightforward guidance and proper effectuation of testator intent. Moreover, the UPC is a collaborative effort of commissioners from all jurisdictions, and thus, "its well-thought-out policy rationale [that] reflects modern social values, as well as various other concerns," makes it universally applicable to all American jurisdictions.[212]

E. Comparison to Life Insurance Policies

The 1990 revision to the Uniform Probate Code broadened the reach of the revocation upon divorce statute, extending it to non-probate assets, including life insurance, retirement benefits, annuities, and trusts.[213] Similar to the conflicting judicial decisions surrounding the distribution of a testator's estate, the distribution of life insurance policies has become equally

207. *See supra* Parts I.C.1–4.

208. *See, e.g.*, Soliman, *supra* note 202, at 418–19 (noting that the adoption of a revocation statute would "promote consistency, something which is significantly lacking in many state probate codes today").

209. Lynn, *supra* note 174, at 28 (noting that revocation statutes "simply eliminate" the possibility that an ex-spouse could benefit from her former spouse's will); *see also* Wilbanks, *supra* note 31, at 949 (noting that not only does the UPC offer statutory guidelines for direction, but also provides reporter's notes and decisions from other jurisdictions).

210. Doris Del Tosto Brogan, *Divorce Settlement Agreements, The Problem of Merger or Incorporation and the Status of the Agreement in Relation to Decree*, 67 NEB. L. REV. 235, 282 (1988).

211. Raymond, *supra* note 94, at 423.

212. Soliman, *supra* note 202, at 419.

213. *See* UNIF. PROBATE CODE § 2-804 (2001) and comments.

as inconsistent.[214] However, many leading authorities in the field are advocating for full revocation of all non-probate assets, such as life insurance, which would affect both the direct beneficiary, as well as additional third parties.[215] Although more convoluted and intrusive on private contract rights than the general revocation doctrine, many states have still chosen to adopt the UPC revocation provisions related to life insurance policies.[216] The strong support for enacting the UPC's revocation provisions as applied to life insurance policies provides compelling justification for the seemingly simpler and more straightforward adoption of the revocation upon divorce doctrine as applied to probate assets.

The impetus to wholly adopt the UPC revocation upon divorce statute stimulates particularly zealous discussion when contemplating life insurance policies.[217] This is largely because the life insurance industry significantly impacts both individual Americans and the United States economy as a whole.[218] According to a 2012 report by the American Council of Life Insurers, life insurance companies provided over $62 billion to life insurance beneficiaries in 2011.[219] Two out of three American families—75 million total—depend on this financial and retirement security every year.[220] In addition, the life insurance industry invested $5.5 trillion into the U.S. economy, accounting for more than one-third of America's Gross Domestic Product (GDP).[221]

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214. *Compare* Hollaway v. Selvidge, 548 P.2d 835 (Kan. 1976), Cincinnati Life Ins. Co. v. Palmer, 94 P.3d 729 (Kan. Ct App. 2004), Ping v. Denton, 562 S.W.2d 314 (Ky. 1978), Stiles v. Stiles, 487 N.E.2d 874 (Mass. App. Ct. 1986), *and* Bersch v. Van Kleeck, 334 N.W.2d 114 (Wis. 1983), *with* Lincoln Benefit Co. v. Heitz, 468 F.Supp.2d 1062 (D. Minn. 2007).

215. *See generally* David, *supra* note 8; Lynn, *supra* note 174; Raymond, *supra* note 94; Soliman, *supra* note 202.

216. See *supra* note 48 for the list of states and territories that have enacted the current version of the Uniform Probate Code in its entirety, including UNIF. PROBATE CODE § 2-804 (2001).

217. *See generally* Raymond, *supra* note 94.

218. *See Little Known Facts*, MASS MUTUALFINANCIAL GROUP, http://www.massmutual.com/home/lifeinsurance (last visited Mar. 9, 2015).

219. *Life Insurers Fact Book 2012*, AMERICAN COUNCIL OF LIFE INSURERS, Table 5.2, Payments from Life Insurance Policies (Dec. 5, 2012), https://www.acli.com/Tools/Industry%20Facts/Life%20Insurers%20Fact%20Book/Documents/factbook2012_entirety.pdf. The insurance industry paid out $62,132,000,000 in life insurance benefits. *Id.*

220. *Facts About the U.S. Life Insurance Industry*, AMERICAN COUNCIL OF LIFE INSURERS (July 2012), https://www.acli.com/About%20ACLI/Documents/Facts%20About%20the%20US%20Life%20Insurance%20Industry_July2012.pdf.

221. *Little Known Facts*, *supra* note 210. The insurance industry has $5.492 trillion in life insurer assets. *Life Insurers Fact Book 2012*, *supra* note 211 at Figure 2.1, *Growth of Life Insurer Assets*. America's total U.S. Gross Domestic Product is $16.800 trillion. *Data: GDP*, THE WORLD BANK, http://data.worldbank.org/indicator/NY.GDP.MKTP.CD (last visited Jan. 14, 2015).

What makes the distribution of life insurance policies particularly complicated is the common understanding that a life insurance constitutes a separate contract between the insured policyholder and the insurance company.[222] Because the policy is viewed as private contract, the life insurance company has a contractual duty to uphold the terms of the insurance contract—which means paying the policy proceeds to the insured's designated beneficiary.[223] As a contract, the beneficiary's claim is wholly unrelated to the spousal status of the couple, and rather stems from the precise terms of the insurance policy issued.[224] This contractual duty to execute the testator's formal intent, as evidenced by the text of the life insurance policy, conflicts with the testator's inferred intent to remove his former spouse as a beneficiary.[225] Additionally, life insurance policies are usually transferred directly and immediately to the named beneficiaries, irrespective of any change in marital status.[226] In most cases, this automatic transfer would be efficient, as a testator's beneficiaries would be able to avoid the lengthy and expensive probate process.[227] However, in the case of a divorced testator, and with 75 million families relying on these crucial benefits, this could prove disastrous.[228] Without a revocation statute in place, the rightful beneficiaries—the testator's current family—are deprived of these crucial benefits at a vital time.[229]

The policy reasons behind upholding the explicit terms of the life insurance policy are generally argued as follows: (1) an insured's failure to formally change his former spouse's status is evidence of his intent to keep his former spouse as a beneficiary; (2) the legislative and judicial systems want to protect the third-party insurance company from being held liable for breach of contract when it dispenses the policy's proceeds to the wrong person; and (3) because a life insurance policy is technically a private contract and a non-probate asset, probate courts should not have an active role in its disbursement and should be bound to follow the contract terms.[230] However, these critiques have not stopped many states from adopting the UPC revocation provisions as applied to life insurance policies.[231] These states are willing to accept the minor costs that arise from an automatic revocation

222. Raymond, *supra* note 94, at 401.

223. *Id.*

224. *Id.* at 405.

225. *Id.* at 401, 408–09.

226. *Id.* at 403–04.

227. *Id.*

228. *Id.* at 405; *Facts About the U.S. Life Insurance Industry*, *supra* note 220.

229. The American Council of Life Insurers report that 75 million families rely on the life insurance benefits derived from their primary policyholder. *See Facts About the U.S. Life Insurance Industry*, *supra* note 220.

230. Raymond, *supra* note 94, at 409–11.

231. See *supra* note 48 for the list of states and territories that have enacted the current version of the Uniform Probate Code in its entirety, including UNIF. PROBATE CODE § 2-804 (2001).

in order to provide a policy that better effectuates testator intent, protects the testator and his rightful beneficiaries, and prevents the testator's mistaken belief that a divorce itself will automatically change the beneficiary status of his life insurance policy.[232] As Hailey H. David points out, "blood is thicker than water," and, more often than not, a divorced decedent would prefer that his assets pass to his heirs, as opposed to his former spouse.[233] In addition, legislatures recognized that divorce constitutes "such a detrimental breakdown in a relationship that automatic alterations to a divorced spouse's testamentary plan [are] needed."[234] The realization that testators are often lax in revising their wills was also a driving force behind this trend.[235]

In her article, *A Fair Presumption: Why Florida Needs a Divorce Revocation Statute for Beneficiary-Designated Nonprobate Assets*, Suzanne Soliman,[236] notes that revoking a beneficiary's status at the time of dissolution is the "logical" solution.[237] The dissolution provides a "definitive moment" for identifying when the marriage—and by implication, the policy contract and beneficiary designation—is terminated.[238] Furthermore, adopting the Uniform Probate Code's recommendations promotes consistency in the whirlwind of present-day probate court decisions.[239]

Without a revocation statute, the consequences of an inaccurate distribution of a testator's life insurance policy are similar to the repercussions faced when distributing a testator's probate assets. However, life insurance policies raise even more complicated issues than does the distribution of

232. Raymond, *supra* note 94, at 412, 416; *see also* Lynn, *supra* note 168, at 18 (discussing the legislative assumption on which the statutory revocation is based—the testator's failure to change his or her will is a simple matter of oversight); Raymond, *supra* note 94, at 30 (discussing the public interest in both minimizing litigation and adhering to testator intent); Soliman, *supra* note 194, at 399, 418–19 (describing the need for Florida to adopt a revocation statute that resembles the UNIFORM PROBATE CODE § 2-804).

233. David, *supra* note 8, at 397.

234. Soliman, *supra* note 202, at 400; *see also* David, *supra* note 8, at 398 (pointing out that the UPC revocation provisions "provide a default plan also based on common experience").

235. Soliman, *supra* note 202, at 400; *see also* David, *supra* note 8, at 395, 410–11 (quoting Mark Davis, Note, *Life Insurance Beneficiaries and Divorce*, 65 TEX. L. REV. 635, 653 (1987)) (pointing out that "the provisions of the UPC actually offer more protection to the divorced decedent" due to the deceased's "forgetfulness, unexpected death, failure to comply with the prescribed procedures, or being the recipient of bad legal advice").

236. Soliman, *supra* note 202.

237. *Id.* at 419–20.

238. *Id.*

239. *Id.* at 418–19. See also Lynn, *supra* note 174, at 3–6, where the author provides a lengthy illustration of how a revocation statute that applied to all will substitutes would drastically minimize litigation disputes. The author points out that, although it is possible that certain testators intend to permit their former spouse to take the proceeds of the policy dispute despite the divorce, the probability is not high; such a statute would intervene in the more "typical situation[]" wherein the testator would intend to give the policy proceeds to the secondary beneficiary rather than the divorced spouse. *Id.* at 15.

probate assets because they implicate the additional dimension of private contract law. The trend to extend revocation upon divorce statutes beyond probate assets to include nonprobate assets, such as life insurance, which is embraced and fully adopted by some states, has the potential for far greater implications.[240] As such, although the push for a revocation upon divorce statute as applied to life insurance policies offers a substantive analogy, the greater purpose of this analogy is to provide a baseline comparison. If some state legislatures are willing to venture into private contract law in order to better effectuate testator intent and promote justice, the remainder of states without an express revocation upon divorce statute should at *least* adopt the UPC's revocation upon divorce statute as it applies to probate matters.

III. CONCLUSION

The UPC's revocation upon divorce statute provides a concrete and objective device to interpret a decedent's will in a confusing and emotionally driven situation—the probating of a loved one's estate. The lack of statutory guidance thus far has provided for inconsistent and contradictory judicial decisions regarding the impact that a divorce has on a will. To resolve this problem, state legislatures should universally adopt the statutory provisions set forth in the Uniform Probate Code's revocation upon divorce statute, Section 2-804. This would promote the efficient resolution of probate administration, protect the common testator who fails to change his will upon divorce, and better effectuate the new intentions of the divorced testator. Adoption of the UPC's revocation upon divorce doctrine is warranted by multiple "principles of equity and due consideration of a decedent's intent."[241] Additionally, it is important that this solution be articulated in a statute rather than through judicial opinions.[242] This Comment has explored the numerous complications that arise when a state fails to fully adopt this clear bright-line standard, as well as provided a thorough analysis of the positive implications of full adoption.

Enactment of the revocation upon divorce statute would not eliminate testator choice. Rather, it merely shifts the "default rule" from one in which a former spouse is likely to benefit from the decedent's estate, to a new rule that accounts for the change in circumstances and properly allocates the es-

240. *See generally* David, *supra* note 8; Lynn, *supra* note 174; Raymond, *supra* note 94; Soliman, *supra* note 202.

241. David, *supra* note 8, at 412. Moreover, when enacting legislation that affects probate law, legislatures usually have two goals in mind: (1) properly effectuating and executing testator intent and (2) providing efficient uniformity. *Id.* at 410.

242. Brogan, *supra* note 210, at 283 (nothing that "[a]ny standard, rule, or presumption offered as a solution to the problems in this area must be clear, unambiguous, and communicated quickly and effectively.").

tate's assets to the decedent's current surviving loved ones.[243] Testators still have many options in order to provide for their former spouses if they so wish.[244] Therefore, reversing this presumption would better effectuate testator intent, as well as provide definite guidance in cases where the parties have not expressly stated their intentions.[245] With the modern marriage and divorce trends in mind, all state legislatures should take note and recognize the importance and necessity of adopting this statute.

243. Soliman, *supra* note 202, at 427.
244. *See supra* Part II.A.
245. Brogan, *supra* note 210, at 281–82.